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Nos. 90-1341 and 90-1517

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY,
Petitioner,

v.

STATE OF OHIO, et al.,

STATE OF OHIO, et al.,
Cross-Petitioners

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT STATE OF OHIO

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QUESTIONS PRESENTED

1. Whether the federal facilities provision of the Clean Water Act, §313, 33 U.S.C. 1323, waives the sovereign immunity of the United States from assessment of civil penalties for violations of state water pollution control laws.

2. Whether Sections 313 and 505 of the Clean Water Act, 33 U.S.C. 1323 and 1365, waive the sovereign immunity of the United States from assessment of civil penalties pursuant to citizen-suit for violations of the Clean Water Act.

3. Whether the federal facilities provision of the Resource Conservation and Recovery Act ("RCRA"), §6001, 42 U.S.C. 6961, waives the sovereign immunity of the United States from assessment of civil penalties for violations of state hazardous waste laws.

4. Whether Sections 6001 and 7002 of RCRA, 42 U.S.C. 6961 and 6972, waive the sovereign immunity of the United States from assessment of civil penalties pursuant to citizen suit for violations of RCRA.

PARTIES TO THE PROCEEDINGS

This case was brought in the district court and litigated in the court of appeals by the State of Ohio on the relation of its Attorney General, Anthony J. Celebrezze, Jr. succeeded by Lee Fisher. The Defendants-Appellants before the court of appeals were the U.S. Department of Energy and Secretary of Energy James D. Watkins.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT STATE OF OHIO

STATEMENT OF THE CASE

In March of 1986, the State of Ohio filed suit against the U.S. Department of Energy ("DOE") for widespread and longstanding violations of state and federal pollution laws. For years, DOE had been egregiously violating both the hazardous waste and water pollution laws. These illegal activities took place at DOE's Feed Materials Production Center ("FMPC"), also commonly known as the Fernald facility, located near Cincinnati.

The Complaint describes thirteen types of hazardous waste safety standards violated at the FMPC. J.A. 14-29,

Counts 3-15. DOE illegally dumped hazardous waste into a waste pit, allowed hazardous waste to leak from an illegal drum storage site, and carried on other unlawful hazardous waste activities. J.A. 8-9, 14-16, Count 3 & Par. 18-23.

Although all hazardous waste facilities have been required since 1981 to install adequate monitor wells to detect hazardous waste constituents leaking into the groundwater, the Complaint recounts that DOE had not yet complied with this standard five years later. J.A. 19-20, Count 7. Contamination is believed to be seeping from the illegal hazardous waste disposal pit. J.A. 17-18, Count 5.

To compound the fact that treatment, storage, and disposal of hazardous waste at the FMPC was illegal, DOE did not bother to manage the hazardous waste with even a pretense of safety. DOE neglected to regularly inspect its hazardous waste facilities for health hazards (J.A. 24-25, Count 10), to maintain aisle space between drums of waste for detection of leakage and for movement of spill and fire fighting equipment (J.A. 25, Count 11), or to keep an emergency contingency plan educating workers about safe responses to fires, explosions, and releases of hazardous waste (J.A. 26, Count 12). DOE failed to perform the waste analyses necessary for safe storage and disposal (J.A. 28-29, Count 15), to write a proper closure plan (J.A. 20-22, Count 8), and to teach its workers how to handle hazardous waste safely (J.A. 27-28, Count 14). In short, DOE widely disregarded the rules of both the hazardous waste authorities and common sense.

By the time the State filed its Complaint, DOE had subjected the Great Miami River and Paddy's Run to illegal concentrations of hexavalent chromium, total chromium, copper, iron, ammonia, suspended solids, and oil and grease for two and one-half years. J.A. 30-33, Count 17. Excessive contaminants were discharged into the Great Miami for years as a result of DOE's disdain for the schedule in its permit requiring the construction and operation of new pollution abatement equipment by June 30, 1984. J.A. 33-35, Counts 18-23. This pollution continued even after the lawsuit was

filed. Because DOE had fallen so far behind on equipment installation, the consent decree now requires compliance by 1990, six years late.[1] J.A. 70, Par. 4.4, 4.5.

To encourage not only DOE, but other federal agencies as well, to comply voluntarily, the State requested civil penalties to address DOE's irresponsible behavior at the Fernald plant. The State presented civil penalty claims to the district court pursuant to the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. 6972(a)) and state law (O.R.C. 3734.13(C)) for hazardous waste violations and the citizen suit provision of the Clean Water Act (33 U.S.C. 1365(a)) and state law (O.R.C. 6111.09) for water pollution violations. J.A. 14-42.

DOE responded by filing a motion to dismiss, hiding behind the doctrine of sovereign immunity. The district court rejected DOE's contentions, finding a clear statement of Congressional intent to waive immunity from civil penalties under both federal and state hazardous waste and water pollution law. The court of appeals affirmed. Though declining to find a RCRA waiver for state hazardous waste penalties, the court of appeals did implement the RCRA waiver for federal hazardous waste penalties and the Clean Water Act waiver for state water pollution penalties.

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[1] In addition to hazardous waste and water pollution violations, the Complaint also describes the radioactive contamination of air, soil, streams, and groundwater at and near the FMPC, including several wells owned by neighbors. J.A. 10, Par. 28. This contamination was caused by dumping large quantities of waste into six pits, emission of tons of uranium into the air, leakage of radon from two silos, piling of debris on the ground, and discharge of wastes into a creek. Id. These activities were the basis for two counts brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). J.A. 11-14, Counts 1-2. Contrary to DOE's statement (Br. 9, n. 8), the first CERCLA claim was settled by consent decree rather than dismissed. J.A. 64, 76-77. The parties agreed to a stay of the second claim. J.A. 78, Par. 8.2. Neither count is subject to this appeal.

SUMMARY OF ARGUMENT

I. To comprehensively control dangerous chemical wastes and to restore beneficial uses to the nation's waters, Congress has designed comprehensive pollution control programs under RCRA and the Clean Water Act. Due to Congressional concern that noncompliance by more than twenty thousand federal facilities would thwart these comprehensive programs, these statutes contain complete waivers of sovereign immunity to encourage federal compliance. Although private industry, municipalities, and States have shouldered their portions of the pollution control burden, federal agencies have chosen to litigate against the waivers rather than comply. As a result, federal agencies have contaminated their own facilities, their neighbors' properties, and the air, soil and water. Environmental cleanup costs for DOE sites, some of which may be irreversibly contaminated, could cost taxpayers between $40 billion to $70 billion during just the next twenty years.

Although Congress entrusted the States with the primary responsibility to enforce its federal pollution control programs, federal agencies have defied state efforts to enforce these laws. In 1976, the federal agencies obtained decisions in *Hancock v. Train*, 426 U.S. 167 (1976), and *EPA v. California*, 426 U.S. 200 (1976) ruling that federal agencies did not have to apply for state permits under the Clean Air Act and the Federal Water Pollution Control Amendments. The Court held that the waivers in these statutes subjected federal agencies to substantive requirements but not to "enforcement mechanisms," known as "procedural requirements." The Court also stated that Congress would have used the words "all . . . requirements" if a complete waiver were intended.

Congress reacted sharply to these decisions and to the continued federal facility pollution, stating that the waivers in both statutes had been intended as complete waivers. Relying on *Hancock*, Congress used both "all" and "procedural" to provide complete waivers for requirements in RCRA during 1976 and the Clean Water Act during 1977.

To deter federal agencies from further illegal activities, Congress authorized civil penalties under both RCRA and the Clean Water Act. Besides protecting human health and property, penalties are a cost-effective means to prevent the staggering cleanup costs occasioned by illegal spillage and dumping. In the usual situation where the mere threat of a penalty convinces a facility to comply, the taxpayers pay for neither a penalty nor a cleanup project.

II. Well over a decade after the enactments of RCRA and the Clean Water Act amendments, federal agencies are still litigating instead of complying. DOE is asking this Court to narrowly interpret the complete waivers in these statutes by applying an "especially rigorous application" of strict construction, a proposed standard of statutory construction contrary to precedent.

III. The federal facilities section of the Clean Water Act, 33 U.S.C. 1323, waives sovereign immunity for all process and sanctions. As commonly used by Congress, the executive branch, and this Court, a "sanction" is any form of penalty. The use of "sanctions" in Section 313 to include civil penalties is confirmed by a subsequent sentence, which provides that the United States is liable only for "civil penalties arising under Federal law."

The purpose of the latter phrase is to ensure that federal agencies are subject only to civil penalties assessed pursuant to Clean Water Act programs approved by U.S. EPA. States, municipalities, and local governments may not penalize federal agencies unless U.S. EPA has authorized their water pollution programs. Once authorized, a State implements the Clean Water Act program on behalf of and in lieu of U.S. EPA. The Clean Water Act provides that compliance with a state permit is compliance with the Act. U.S. EPA and citizens can enforce the permit as federal law. The statute and its legislative history repeatedly refer to permits issued by a State "under Section 402" of this Act.

The term "arise" means to "originate" or "come into being". The Clean Water Act and U.S. EPA's regulations make state

assessment of civil penalties a mandatory requirement for approval, and continued authorization, of the State's program. Ohio's civil penalty in O.R.C. 6111.09 was enacted to comply with this programmatic requirement. U.S. EPA approved Ohio's penalty provision, and its application to federal agencies, as part of the State's authorized program.

Contrary to DOE's position, "arising under Federal law" does not mean *conversion* into federal law. Therefore, a state penalty provision is still state law, even though it originates under or comes into being as a result of the Clean Water Act.

DOE's attempt to apply caselaw construing federal question jurisdiction ignores the entirely different purpose of the Clean Water Act waiver. "[C]ases arising under" in 28 U.S.C. 1331 reflects Congressional intent to protect federal statutes from interpretation by hostile state courts. "[C]ivil penalties arising under" in 33 U.S.C. 1323 was meant to protect federal agencies from unapproved penalties while simultaneously encouraging federal agency compliance with Congress' comprehensive pollution control program.

IV-V. Both Sections 313 and 505 of the Clean Water Act waive immunity for civil penalties imposed pursuant to citizen suit. Sections 6001 and 7002 of RCRA similarly waive immunity for citizen suit penalties under that statute. Both citizen suit provisions define the United States as a "person", which in turn is subject to the imposition of "appropriate" civil penalties pursuant to the penalty sections of these acts. The use of "appropriate" refers to the judicial discretion to determine the appropriate size of the penalty, as recognized in the caselaw and U.S. EPA regulations. The Senate committee report for RCRA accompanying Section 7002(a) states that federal agencies are subject to its penalty provisions.

VI. To accomplish a complete hazardous waste waiver after *Hancock*, Section 6001 of RCRA waives immunity for "all" requirements. To subject federal agencies to "enforcement mechanisms" such as state penalties, the

section also waives immunity for all "procedural" requirements. This Congressional intent to authorize penalties is complemented by the normal meaning of "requirements," which is "something called for or demanded." In fact, Congress rejected the federal facilities section of the House bill, which would have restricted penalty assessment to U.S. EPA, in favor of a Senate bill waiving immunity for all federal and state requirements.

DOE's proposes to assign the narrowest possible meaning to these statutes by attributing strained, improbable meanings to their terms. The Court should interpret these statutes according to their plain meaning and consistent with the Congressional purpose to comprehensively control pollution. Only then will federal facilities stop litigating and start complying.

ARGUMENT

I. Because Pervasive Defiance From Federal Agencies Has Thwarted Congressional Plans To Comprehensively Control Hazardous Waste And Water Pollution, Congress Has Enlisted The States' Assistance By Providing Them With The Enforcement Mechanisms Necessary To Force Federal Agency Cooperation.

A. RCRA And The Clean Water Act Establish Comprehensive Programs To Abate Dangerous Chemicals And To Purify The Nation's Water. All Persons, Including Federal Agencies, Are Required To Do Their Share To Safely Handle Their Hazardous Wastes And To Restore The Usefulness Of The Water By Controlling Their Own Pollution.

When enacting RCRA, Congress was primarily concerned about the unsafe management and disposal of hazardous waste. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 6241. Citing

numerous examples of groundwater pollution, fish kills, wildlife and livestock kills, and human poisonings, the House found that these wastes can "blind, cripple or kill . . . defoliate the environment, contaminate drinking water supplies and enter the food chain." H.R. Rep. No. 1491 at 11, 17-23, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6249, 6254-61. *See* also, S. Rep. No. 988, 94th Cong., 2d Sess. 3 (1976). Congress established a comprehensive, nationwide program to control these dangerous chemical wastes from creation to ultimate disposal (known as "cradle-to-grave"). S. Rep. No. 988 at 3; H.R. Rep. No. 1491 at 11, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6249.

Congress was particularly concerned about hazardous waste mismanagement at more than twenty thousand facilities owned by the federal government. H.R. Rep. No. 1491 at 46, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6284. Because Congress realized that a comprehensive program would be ineffective without the cooperation of federal facilities, Congress wanted federal facilities to "provide national leadership in dealing with solid waste and hazardous waste disposal problems." S. Rep. No. 988 at 24.

The Federal Water Pollution Control Act, as amended by the Clean Water Act (hereinafter both referred to as Clean Water Act), similarly established a comprehensive system to protect the public from harmful wastes. The Clean Water Act has as its objective the restoration of "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Congress intended to restore and protect these waters to the fullest extent possible under the Commerce Clause. *Quivira Mining Co. v. U.S. EPA*, 765 F.2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986).

Therefore, Congress required the U.S. Environmental Protection Agency ("EPA") to develop "*comprehensive* programs for preventing, reducing, or eliminating the pollution of navigable waters" (emphasis added) in order to protect the water for fish, aquatic life, wildlife, recreation, drinking water, agriculture, industry, and other purposes. 33 U.S.C. 1252(a). In fact, the goal of the Clean Water Act was

to *eliminate* all pollution discharges into navigable waters by 1985. 33 U.S.C. 1251(a)(1).

Although Congress assigned U.S. EPA the initial task of formulating comprehensive pollution control programs, the States were expected to assume the burden of implementing both the water pollution and hazardous waste programs. 33 U.S.C. 1251(b); 42 U.S.C. 6902(a)(1),(7). This state implementation was to be accomplished through U.S. EPA's authorization of States to administer and enforce the programs. 33 U.S.C. 1342(b); 42 U.S.C. 6926.

The purposes of these comprehensive water pollution and hazardous waste programs are undermined when only some polluters responsibly control their wastes. Therefore, Congress, in an exercise of fairness, assigned a share of responsibility to all waste producers, including corporations, individuals, municipalities, counties, states, and federal agencies. Congress' intent to make these programs comprehensive is dramatized by the fact that a federal agency is excused from compliance only where a Presidential exemption has been obtained for national security or other "paramount" national interests and has been reported to Congress. 33 U.S.C. 1323(a); 42 U.S.C. 6961. Unfortunately, the federal entities expected to provide national leadership in these efforts (S. Rep. 988 at 24) have refused to do their share.

B. Because Federal Agencies Have Exploited Sovereign Immunity As A Shield For Their Pollution Practices, Congress Has Broadly Removed Sovereign Immunity As A Defense In The Field Of Pollution Control.

While Congress was considering the 1972 water pollution control amendments, it found that federal agencies had not been doing their share to abate pollution under the previous federal water pollution statutes. The Senate described the problems the nation was having with polluting federal agencies:

> Evidence reviewed in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute.

S. Rep. No. 414, 92d Cong., 2d Sess. 67 (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 3733-34.

The House noted the same problems:

> The Committee, after hearing of numerous examples of flagrant violation of pollution controls is determined that the Federal facilities shall be a model for the nation . . . .

H.R. Rep. No. 911, 92d Cong., 2d Sess. 188 (1972).

Due to its dissatisfaction with the noncompliance record of federal facilities, Congress included 33 U.S.C. 1323 in the 1972 amendments. This section waived immunity for state water pollution laws as well as federal laws. Such a waiver was essential, since the act gave the States the primary role in abating water pollution and limited U.S. EPA to a supervisory role. 33 U.S.C. 1251(b). Federal facilities, then, could no longer ignore their water pollution control obligations under either state or federal water law.

However, while considering the Clean Water Act Amendments of 1977, Congress found that "many federal agencies continue to try to evade the mandate of Federal law to comply with all State and local requirements." H.R. Rep. No. 294, 95th Cong., 1st Sess. 199 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News at 1277-78. Furthermore, these agencies were obtaining court decisions exempting them from various water pollution requirements, such as permits, under the guise of sovereign immunity. *Id.* As a result, Congress amended 33 U.S.C. 1323 to expressly authorize

sanctions against federal facilities to give them incentive to comply. S. Rep. No. 370, 95th Cong., 1st Sess. 67-68 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 4392-93.

In the meantime, Congress had enacted RCRA in 1976. Upon hearing of continuing widespread federal disregard for the previously enacted water and air laws, H. Rep. No. 1491 at 45, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6283-84, the House actually proposed to relieve the States of the burden of enforcing the hazardous waste program at federal facilities. H. Rep. No. 1491 at 2466, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6262, 6304-05. This bill, which would have placed the burden solely on U.S. EPA, *id.*, was later rejected by Congress in favor of the Senate bill, which imposed the primary enforcement burden on the States. S. Rep. No. 988 at 23-24. Simultaneously, Congress waived all immunity from enforcement of state and federal laws to give federal agencies the incentive to comply.

Unfortunately, even explicit waivers of sovereign immunity have done little to encourage federal agencies to comply. According to the Comptroller General in testimony before a House subcommittee, "inattention and negligence in complying with environmental laws" has contributed to "widespread contamination" at DOE facilities, some of which may be "irreversibly contaminated." Cleanup at Federal Facilities: Hearing on H.R. 765 before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess., ser. 4, at 34, 53 (1989). This contamination has spread off-site at some facilities. *Id.* DOE has estimated that cleanup of hazardous and other wastes at its sites could cost taxpayers between $40 billion to $70 billion during just the next twenty years. *Id.*, at 44.

C. Because This Court In *Hancock v. Train* Equated "Procedural Requirements" With "Enforcement Mechanisms," Congress Waived Federal Agency Immunity For Civil Penalties And Other Enforcement

Mechanisms By Subjecting The Agencies To "All Procedural Requirements."

Rather than complying with the pollution laws, the federal agencies have chosen to aggressively litigate against the laws. This litigation has resulted in a double standard, one exempting federal agencies from the law, and another applicable to private industry, states, and other citizens.

State attempts to control federal pollution through permits ended in federal agency challenges to the waivers of both the Clean Air Act in *Hancock v. Train,* 426 U.S. 167 (1976), and the Federal Water Pollution Control Act in *EPA v. California,* 426 U.S. 200 (1976). Narrowly construing the waivers, the Court ruled that Congress had not waived immunity for permits and other enforcement mechanisms.

At the time the Court considered *Hancock* and *California,* the air and water statutes waived immunity for "requirements." At issue in these cases was whether "requirements" included only *substantive* obligations, or whether "requirements" also included *procedural* obligations such as the procurement of permits. The Court held that Congress did not intend to include permits and other procedural obligations within the meaning of "requirements". *California,* 426 U.S. at 223; *Hancock,* 426 U.S. at 197-98. The Court's distinction between substantive and procedural requirements is important, because Congress had this distinction in mind when writing the current waivers in RCRA and the Clean Water Act.

Before *Hancock,* the Court of Appeals for the Fifth Circuit had phrased the issue in the same fashion, coming to the opposite conclusion. In *Alabama v. Seeber,* 502 F.2d 1238 (5th Cir. 1974), the Fifth Circuit distinguished between substantive duties and enforcement mechanisms in the Clean Air Act, as follows:

> Defendants seek to avoid the impact of §118 by engrafting upon it a *substantive procedural overlay.* They argue that the phrase "requirements

> respecting control and abatement of air pollution" means only requirements such as emission standards and limitations, which they label *"substantive," and does not include mechanisms, e.g., permit systems, for enforcing these requirements.*

(Emphasis added). *Id.*, at 1245. Relying on the wording of the Clean Air Act waiver, the "scheme of the Act as a whole," and "Congressional purpose," the Fifth Circuit held that enforcement mechanisms were requirements. *Id.*, at 1245-47.

Although *Seeber* was vacated due to the subsequent decision in *Hancock*, this Court in *Hancock* phrased the issue in the same fashion by quoting from *Seeber:*

> [T]he question is . . . "whether Congress intended that the *enforcement mechanisms* of federally approved state implementation plans, in this case permit systems, would be" available to the States to *enforce* that duty.

426 U.S. at 183 (emphasis added). The Court rejected the State's contention that Congress had intended to "subject federal facilities to the *enforcement mechanisms*" of State law (emphasis added). *Id.*, at 184. In holding that enforcement mechanisms were not "requirements", the Court repeatedly distinguished between enforcement mechanisms and substantive duties. *Id.*, at 182-98. In fact, the Court's opinion uses "enforcement mechanisms" and derivatives of "enforce" no fewer than thirty-one times when discussing "procedural requirements."

Similarly, *EPA v. California* referred to water permits as "a means of achieving and enforcing the effluent limitations." 426 U.S. at 205. Noting that the air and water act waivers were "virtually identical" and declaring that *California* was "governed by the same fundamental principles" (*id.*, at 211) as *Hancock*, the Court held that water permits also were not "requirements".

Therefore, just before Congress passed RCRA, the courts had drawn the distinction between substantive requirements on one hand, and enforcement mechanisms or procedural requirements, on the other. The Court also declared that it was "notable" that Congress required federal agencies only to comply with "requirements" instead of requiring compliance with "all" requirements. 426 U.S. at 182.

Congress reacted sharply to these decisions when it passed RCRA in 1976 and amended the Clean Air Act and Federal Water Pollution Control Act in 1977. The House discovered that federal agencies had been invoking sovereign immunity to avoid their air pollution control duties, "including, of necessity, those procedural requirements and *sanctions incidental to implementation and enforcement* of the substantive requirements" which in the committee's view had been mandatory for federal agencies pursuant to the previous Clean Air Act waiver. H.R. Rep. No. 294 at 199, *reprinted in* 1977 U.S. Code Cong. & Ad. News at 1277-78. The House then discussed the *Hancock* decision, stating:

> In the committee's view, the language of existing law should have been sufficient to insure Federal compliance in all of the aforementioned situations. Unfortunately, however, the U.S. Supreme Court construed Section 118 narrowly in *Hancock v. Train* . . . . The new section 113 of the bill is intended to overturn the *Hancock* case . . . .

Id. Congress had a similar adverse reaction to the Supreme Court decision in *California*, commenting:

> The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to *all of the provisions of State and local pollution laws.* Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent.

S. Rep. No. 370 at 67, *reprinted in* 1977 U.S. Code Cong. & Ad. News at 4392 (emphasis added).

Consistent with its original intent to completely waive federal immunity in the air and water statutes, Congress responded to *Hancock* and *California* by writing waivers for both "substantive" and "procedural" requirements into RCRA, the Clean Water Act, and the Clean Air Act. Because the existing court decisions had referred to enforcement mechanisms as "procedural requirements," Congress used this terminology to subject federal facilities to all enforcement mechanisms. Relying heavily on the emphasis in *Hancock* on the use of "all" to accomplish a *complete* waiver, Congress used "all" to describe the requirements waived by all three statutes. Thus, Congress unambiguously effectuated a complete waiver for polluting federal facilities, including *all* enforcement mechanisms. *See* also, *Middlesex Cty. Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 5 (1981) (referring to civil and criminal penalties of the Clean Water Act as "enforcement mechanisms").

More than a decade after Congress responded to *Hancock* and *California* with comprehensive waivers, federal agencies have continued to litigate rather than comply. Now DOE requests that the Court ignore the instructions made to Congress in *Hancock*, in order to again frustrate Congressional intent.

D. Because Penalties Are Necessary To Deter Illegal Activity, Congress Found That Penalties Are An Essential Component Of Its Comprehensive Programs To Reduce And Eliminate Pollution.

The courts have long recognized that civil penalties are an effective mechanism to enforce the law. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *Oceanic Steam Navigation Co. v. Stranaham*, 214 U.S. 320 (1908). A civil penalty will deter the violator from further illegal activity. *ITT*, 420 U.S. at 231-32.

Accordingly, the legislative history of the Clean Water Act shows that Congress regarded civil penalties and other sanctions as indispensable components of its comprehensive water pollution abatement program. In fact, Congress attributed the failure of its pre-1972 water pollution laws in part to the lack of sanctions for noncompliance. S. Rep. No. 414 at 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 3730-31. As the Senate observed, if illegal conduct is to be prevented, "the threat of sanction must be real, and enforcement provisions must be swift and direct." *Id.* The U.S. EPA Administrator at the time, William Ruckelshaus, testified that the penalties in the 1972 House bill were necessary to make U.S. EPA's authority "meaningful." H.R. Rep. No. 911 at 161.

Congress saw a similar need for penalties to deter illegal hazardous waste activities. During Congress' consideration of RCRA in 1976, the Department of Justice endorsed civil and criminal penalties as necessary to enforce the law. H.R. Rep. No. 1491 at 83-84, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6321.

Due to the need for enforcement, Congress has generally provided both criminal and civil penalties to enforce its environmental statutes, including the Clean Water Act and RCRA. Furthermore, where a State is authorized to administer the federal pollution control program under either of these statutes in lieu of the federal government, it is a *mandatory* prerequisite of federal law that these States first enact criminal and civil penalty provisions to enforce these programs.

When violators cannot be penalized for past misconduct, they will violate the law with no fear of punishment unless and until a lawsuit is filed and an injunction is issued. This sorry reality was Congress' motivation for insisting that penalties be used to encourage voluntary compliance by all, including federal, polluters.

Pursuant to this authority, the federal government "routinely" assesses civil penalties against municipalities and

state agencies for violations of the pollution laws. H.R. Rep. No. 111, 102d Cong., 1st Sess. 13 (1991). In fact, the federal government has penalized state agencies and local governments in 49 of the 50 states. *Id.*

In contrast, the federal executive branch has waged a campaign t have the civil penalty provisions of both federal and state environmental statutes declared inapplicable to federal facilities. This strenuous effort by federal agencies shows their distaste for being penalized, which is precisely why civil penalties are an effective means to finally obtain their compliance with the law.

Congress' application of penalties to federal facilities, besides protecting the health and property of nearby citizens, is also cost-effective. The infrequent penalties paid to guarantee compliance are dwarfed by the staggering cleanup costs occasioned by illegal spillage and dumping. In the usual situation where the mere threat of a penalty convinces a facility to comply, the taxpayers pay for neither a penalty nor a cleanup project. Had federal agencies not been complacent in their ability to persuade the courts to void Congressional penalty waivers, they would have implemented cost-effective safety measures to comply with the law and the multi-billion dollar national cleanup crisis would have been substantially avoided.

A penalty's deterrent effect on a federal agency stems partly from its loss of the money. Where the agency pays the penalty from its own account, the agency loses the money. Loss to the agency occurs even where its funds are transferred to another account in the federal Treasury pursuant to a citizen suit, since the penalized agency has no access to that account. Contrary to DOE's statement that Congress could not have intended to shift funds from one Treasury account to another (DOE Br. 33, 42), this is exactly what Congress intended. The most effective monetary deterrent results from payment of the penalty to a state, since the federal government loses the money altogether.

Of even greater deterrent than the loss of funds is the penalty's public declaration that the penalized agency has been punished for violating the law. The penalty focuses attention on the wayward agency by the public, the executive branch and Congress, which will hopefully make inquiries into the agency's behavior and take steps to remedy it. The publicity generated by this undesired attention will convince other federal agencies to comply with the law in the same manner as responsible state and private entities.

This undesired attention occurs whether the penalty is paid from an agency account or the Judgment Fund. It also occurs whether the money is paid to a State or to another federal Treasury account pursuant to a citizen suit.

Although larger penalties generate more adverse publicity and Congressional attention, even a small penalty against a federal agency ordinarily invites public scrutiny due to the identity of the violator. In fact, a Congressional Budget Office study has shown that, even where there is undisputed state authority to penalize federal agencies (e.g., under the Clean Air Act waiver), these penalties have not been "substantial." H.R. Rep. No. 111 at 13-14. Taking the allegations of the complaint as true in the case at bar, the penalty to be paid by DOE for its 35,205 days of state law violations amounts to only $7.10 per day of violation. Therefore, where the courts enforce Congress' penalty waiver, the States have found that small penalties frequently generate federal compliance.

DOE encourages the Court to read holes into the waivers of immunity of RCRA and the Clean Water Act.[2] Acceptance

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[2] DOE has lodged with the Court a DOE statement on H.R. 2194 and S. 596, arguing that the statement describes issues Congress should consider before waiving immunity. DOE Br. 39, n. 34. This statement was a self-serving DOE attempt to boost its image and to persuade Congress to weaken the RCRA waiver. DOE's statement contends it should be exempt from penalties because the Department had a "late start" towards developing technology for treatment of radioactive hazardous waste. However, DOE's "late start" towards RCRA compliance resulted from its refusal to acknowledge that RCRA applied in any fashion to any of its activities, until it lost the argument in a lawsuit. *Legal Environmental Assistance Foundation v. Hodel*, 586 F.Supp. 1163 (E.D.

of DOE's invitation would do more than let DOE escape retribution for its disgraceful conduct - it would also repudiate the language of both statutes and defeat Congress' intent to comprehensively stop hazardous waste and water pollution, including costly, federally sponsored pollution.

E. Because The Department Of Justice Prohibits The U.S. Environmental Protection Agency From Suing Sister Federal Agencies For Illegal Activities, The States Must Be Allowed To Utilize The Civil Penalty Deterrent Provided By Congress To Enforce The Law At Federal Facilities.

The inability of U.S. EPA to enforce the pollution laws against its sister agencies underscores the need for state enforcement. Under Department of Justice policy, U.S. EPA is not allowed to file suit against other federal agencies. Rothmel, *When Will The Federal Government Waive The Sovereign Immunity Defense And Dispose of Its Violations Properly?*, 65 Chi.-Kent L. Rev. 581, 581-82 & n. 6 (1990). As a result, former U.S. EPA Assistant Administrator J. Winston Porter testified before a House committee that U.S. EPA had been forced to rely on "jawboning" federal agencies in attempt to obtain compliance. H.R. Rep. No. 111 at 17.

Therefore, in the absence of U.S. EPA lawsuits, the states are left to conduct enforcement at federal facilities. It is thus essential that the States be allowed to utilize the civil penalty

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[2] *(footnote 2 cont.)*
Tenn. 1984). The delay in development of treatment technology was caused by DOE's "late start," and at any rate, did not justify DOE's past practices of simply dumping the waste in the meantime. Furthermore, Section 1006(a) of RCRA, 42 U.S.C. 6905(a), exempts DOE from RCRA liability whenever RCRA standards are inconsistent with radiological safety precautions. DOE also may apply to U.S. EPA for variances on land ban wastes for which it has no technology. Long ago, Congress made the judgment that the public interest would be served by a broad waiver, with minor exceptions such as Section 1006(a). At the present time, neither the House nor the Senate has seen fit to adopt the penalty exemptions proposed by DOE.

deterrent Congress intended them to use against uncooperative federal agencies.

II. The Rules Of Statutory Construction Applicable To Penal Laws And Waivers Of Sovereign Immunity Respect The Intent Of Congress, Rather Than Utilizing An "Especially Rigorous Application" Of Strict Construction Dependent On The Invention Of Strained, Improbable Meanings For The Statutes.

DOE proposes a new rule of statutory construction which would not only threaten the majority of Congress' waivers, but would also impede enforcement of criminal and other penal laws at federal facilities. DOE advocates an "especially rigorous application" (DOE Br. 17) of strict construction, arguing that a "particularly clear statement" is required for monetary waivers and penal statutes. In its petition for rehearing below, DOE represented that the decisions of this Court require a waiver to "be so clear and unequivocal as to admit no other possible construction." R. 11, p. 2. DOE's proposed rule would not only change the courts' approach to monetary claims under the Torts Claim Act and other statutes, but would also hinder enforcement against crimes and other penal offenses at federal facilities. As explained below, neither the penal nor waiver decisions of this Court call for an added measure of strictness in this case.

A. When Applying Strict Construction To Penal Laws And Waivers Of Sovereign Immunity, The Court Has Drawn Upon The History And Purpose Of The Legislation To Determine Legislative Intent.

Rather than reading a statutory excerpt in isolation or out of context, *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 285 (1956), the Court has looked for guidance to "the whole law, and to its object and policy." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). The Court does not depart from this principle even when determining

the rights of the United States. *Richards v. United-States*, 369 U.S. 1, 11 (1962).

In construing a penal water pollution statute in *United States v. Standard Oil Co.*, 384 U.S. 224 (1966), the Court stated that strict construction is no substitute for "common sense, precedent, and legislative history." *Id.*, at 225. The Court's opinion emphasized that the Court would not construe the criminal statute "in a vacuum" nor would the Court adopt a "narrow, cramped reading" which would result in a "partial defeat" of the statute's purpose. *Id. See* also, *United States v. Braverman*, 373 U.S. 405, 408 (1963) (criminal statute construed in light of economic ills motivating passage of the law).

The same principle governs waivers of sovereign immunity. While discussing "the immunity enjoyed by the United States as territorial sovereign," the Court explained the necessity of gauging Congressional sentiment:

> The outlook and feeling thus reflected are not merely relevant to our problem. They are important . . . . A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process.

National City Bank of New York v. Republic of China, 348 U.S. 356, 359-60 (1955). *See* also, *United States v. Yellow Cab Co.*, 340 U.S. 543, 550 (1951) (recognizing Congressional intent to broadly waive federal tort immunity in order to reduce private bills for relief in Congress).

In the case at bar, the Court should interpret the waivers of sovereign immunity in a manner which effectuates Congress' comprehensive plans to control all hazardous waste and water pollution. Exemptions for federal agencies would defeat this Congressional objective.

B. When Construing Penal Statutes And Waivers Of Sovereign Immunity, The Court Has

Interpreted Their Terms According To Their Plain And Ordinary Meaning.

When interpreting waivers, the Court has usually assumed that legislative purpose is expressed by the "ordinary meaning" or "common usage" of the statutory words. *Kosak v. United States,* 465 U.S. 848, 853 (1984); *Yellow Cab Co.,* 340 U.S. at 548. The Court applies the same principle of common usage to penal laws, assigning the "fair meaning" to disputed terms. *United States v. Cook,* 384 U.S. 257, 263 (1966). Therefore, the Court has rejected efforts by litigants to exercise "ingenuity to create ambiguity" in the plain terms of a waiver. *United States v. James,* 478 U.S. 597, 604 (1986).

C. Strict Construction Does Not Assign The Narrowest Possible Meaning To Penal Laws And Immunity Waivers, Especially Where These Statutes Are Enacted In Broad, Sweeping Terms.

Strict construction is not used to create ambiguity in a statute "as an overriding consideration of being lenient to wrongdoers." *United States v. Turkette,* 452 U.S. 576, 587, n. 10 (1981). Therefore, the Court does not assign penal statutes their "narrowest possible meaning" in disregard of Congressional intent. *United States v. Bramblett,* 348 U.S. 503, 510 (1955). Accord, *Cook,* 384 U.S. at 262. Instead, penal statutes are given their "fair meaning" in accord with the evident intent of Congress, *Cook,* 384 U.S. at 262-63, even where the statute speaks in "broad, absolute terms." *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 550 (1961).

Similarly, immunity waivers must be sensibly construed according to their literal language. On various occasions, the Court has quoted the following statement from a decision by Judge Cardozo:

> The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement

> of construction, where consent has been announced.

Kosak, 465 U.S. at 853, n. 9; *Yellow Cab*, 340 U.S. at 554.

The Court does not assume the authority to narrow a waiver intended by Congress. *Bowen v. City of New York*, 476 U.S. 467, 479 (1986); *United States v. Kubrick*, 444 U.S. 111, 118 (1979). While the Court should not promote extravagance by "careless construction" of waivers, neither should it "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

Congressional intent to broadly waive immunity must not be "thwarted by an unduly restrictive interpretation." *Canadian Aviator v. United States*, 324 U.S. 215, 222 (1945). The courts may not whittle down a broad waiver by resorting to a review of legislative history or other refinements. *Yellow Cab.*, 340 U.S. at 549-50.

D. When Applying The Rule of Strict Construction, The Court Has Refrained From Creating Or Enlarging Exceptions To Penal Laws And Waivers Of Immunity.

The Court has refrained from using "strained and technical constructions" to create exceptions to or loopholes in penal statutes. *Kordel v. United States*, 335 U.S. 345, 349 (1948). Similarly, strict construction will not be utilized to enlarge the exceptions expressly written in a clear and sweeping waiver of immunity. *United States v. Muniz*, 374 U.S. 150, 166 (1963); *Yellow Cab*, 340 U.S. at 548, n. 5, 549 (disapproving "fine distinctions" between claims to exempt some claims from the waiver). Exceptions to a waiver should not be "broadly construed," because "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." *Kosak*, 465 U.S. at 853, n. 9. The courts' proper objective is to identify the circumstances within the words and reason of the exceptions, "no less and no more." *Id.*

E. Congress Is Not Required To Specifically Spell Out Each And Every Federal Action Included In A Penal Statute Or Immunity Waiver.

Strict construction does not force Congress into a straitjacket of specificity when writing waivers of sovereign immunity. *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174 (1988), construed a waiver which categorically subjected federal entities to workers' compensation laws "to the same extent" as such laws are applied to private facilities. *Id.*, at 185. The Court found that this waiver authorized supplemental awards similar to penalties for the violation of state safety regulations even though supplemental awards were not expressly listed in the waiver. *Id.*, at 183-84.

Similarly, when construing the waiver for "any claim . . . on account of personal injury" in the Torts Claims Act, the Court found that Congress had waived immunity for each and every claim not expressly exempted by the Act. *Yellow Cab,* 340 U.S. at 548-50. The Court rejected the government's claim that the statute was not "sufficiently specific." *Id.*, at 555.

If Congress attempted to list each item or activity subject to waiver, instead of broadly categorizing them, Congress would inevitably miss specific items intended for inclusion. Insisting on itemization as a condition of waiver would thus defeat the intent of Congress.

F. Contrary To DOE's Position, The Decisions Of This Court Do Not Authorize An "Especially Rigorous Application" Of Strict Construction To Penalty Waivers.

As support for its rule of "especially" strict construction, DOE relies on *Lehman v. Nakshian,* 453 U.S. 156 (1981) and *Missouri Pac. R.R. v. Ault,* 256 U.S. 554 (1921). DOE Br. 16. According to DOE, *Lehman* requires a "particularly" clear waiver when it "affects the public fisc." DOE Br. 16. However, not even a generous reading of that case discloses a

command to interpret monetary waivers more harshly than other waivers.[3]

DOE's dependence on *Ault* to defeat general Congressional penal waivers also finds no support in the case. Although the statute in *Ault* broadly waived immunity for "all laws and liabilities as common carriers", the statute added a proviso "except in so far as may be inconsistent . . . with any order of the President." 256 U.S. at 558. The Director General of Railroads, acting as the President's representative (*id.*, at 556), had issued an order exempting the federal government from fines and penalties (*id.*, at 564). Thus, it was the President's order which preserved sovereign immunity in *Ault*, not a narrow judicial interpretation of the statute's sweeping waiver language. Any contrary holding would be contrary to subsequent decisions in *Goodyear Atomic, supra,* and *Yellow Cab, supra,* effectuating broad Congressional waivers.

DOE's proposed rule of especially strict construction violates the commands of this Court described in Argument II(A)-(E) above. In rejecting a past attempt by a litigant to narrowly construe a penalty statement in such a fashion, the Court once noted:

> [It is] "easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms as to preclude the exercise of ingenuity in raising doubts about its construction."

Northern Securities Co. v. United States, 193 U.S. 197, 359-60 (1904). The Court should reject DOE's efforts to defeat Congressional purpose by attributing strained, improbable

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[3] While most of the immunity cases cited by the State and DOE construe waivers requiring the expenditure of federal funds, only one espouses the "especially" narrow construction urged by DOE. This sole exception is *Library of Congress v. Shaw,* 478 U.S. 310 (1986), which applies a special "no-interest rule" to provide "an added gloss of strictness" to interpretation. *Id.*, at 318. This standard applies only to waivers for interest, *Missouri v. Jenkins,* 491 U.S. 274, 281, n. 3 (1989).

meanings to the waivers in RCRA and Clean Water Act.

III. The Court Of Appeals Below Correctly Held That Ohio's Civil Penalties Arise Under Federal Law, Since Ohio's Water Pollution Prevention Program and Penalties Originated From The Clean Water Act.

A. As Commonly Used, And As Used In The Clean Water Act, The Term "Sanctions" Includes Civil Penalties.

To stem the flow of federal water pollution, Congress amended the federal facilities section of the Clean Water Act in 1977. This section now provides in pertinent part as follows:

> (a) *Each department,* agency, or instrumentality . . . of the Federal Government . . . *shall be subject to,* and comply with, *all Federal, State,* interstate, and local requirements, administrative authority, and process and *sanctions* respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply . . . (C) *to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.*
>
> No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the *United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court* . . . .

33 U.S.C. 1323 (emphasis added).

The first sentence makes it evident that departments and agencies of the executive branch are subject to *all* federal and state sanctions. Subdivision (C) of the second sentence shows that federal entities are subject to *any* federal and state sanctions. The only exception to this all-inclusive waiver for sanctions is the last sentence quoted above. Significantly, the last sentence specifically exempts federal *officers* from civil penalties for official duties, an exemption which would be unnecessary if the previous language of the section had not already waived liability for civil penalties.

Therefore, federal agencies are subject to civil penalties if civil penalties are a form of sanction in the plain and ordinary usage of that word. In order to ascertain the plain and ordinary meaning of a word, the courts frequently rely upon the use of dictionary definitions. *Cf, Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 199 fn. 20 (1976).

Black's Law Dictionary defines "sanction" as:

> . . . That part of a law which is designed to secure enforcement *by imposing a penalty for its violation* . . .

Black's Law Dictionary 1341 (6th ed. 1990). *Ballentine's Law Dictionary* (3rd ed. 1969) at 1137 further states that a sanction is " . . . the imposition of any form of penalty or fine." Thus, the common usage of "sanction" describes a penalty imposed on a violator of the law.

Even the Department of Justice uses the word "sanction" to describe penalties or punishment. The Department, in its comments on the 1976 RCRA legislation, used the terms "sanctions" and "penalties" interchangeably in characterizing civil and criminal penalties under both RCRA and the Clean Water Act. H.R. Rep. No. 1491 at 83-84, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6321. *See also,* the testimony of U.S. EPA's Administrator on the 1972 water pollution legislation, in which he refers to criminal and civil penalties as "enforcement sanctions." H.R. 911 at 161.

The Court has also referred to penalties or fines as sanctions, including the penalties and fines imposed pursuant to the Clean Water Act and the Clean Air Act. *See Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 53 (1987); *United States v. Ward*, 448 U.S. 242, 249 (1980); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 282 (1978). Thus, the courts, as well as Congress, U.S. EPA, and the Department of Justice, commonly use the term "sanctions" to describe civil penalties.

The legislative history confirms Congress' complete waiver in the Clean Water Act. The Senate committee report declares that federal facilities are "subject to all of the *provisions* of State and local pollution laws." (Emphasis added). S. Rep. No. 370 at 67, *reprinted in* U.S. Code & Ad. News at 4392. Civil penalties are provisions of state law.

In addition to the district court and court of appeals below, two courts have held that "sanctions" in 33 U.S.C. 1323 include civil penalties. *Sierra Club v. Lujan*, 931 F.2d 1421, 1425 (10th Cir. 1991); *Metropolitan Sanitary Dist. v. U.S. Dept. of Navy*, 722 F.Supp. 1565, 1570 (N.D. Ill. 1989). Both courts rejected the position advocated by DOE in the case at hand, that the meaning of "sanction" is limited by the meaning of "process". DOE Br. 19-21. As noted in *Lujan*, this interpretation contradicts the meaning ascribed by Congress to the same words in the Clean Air Act waiver upon which 33 U.S.C. 1323 is based. 931 F.2d at 1428; H.R. Rep. No. 294 at 200, *reprinted in* 1977 U.S. Code Cong. & Ad. News at 1279.

DOE's view that "process" limits "sanctions" to enforcement of a court order is also contrary to the ordinary meaning of "process." "Process" is not limited to court orders, but "as now commonly understood" refers to a summons, complaint and "all the acts of a court from the beginning to the end of its proceedings." Black's Law Dictionary 1205 (6th ed. 1990). *See* also, *Girardier v. Webster College*, 563 F.2d 1267, 1272-73 (8th Cir. 1977). A court uses its process to assess a penalty, starting with the complaint and summons. Therefore, even if DOE's "narrowest" of

interpretations were applicable to the waiver, the waiver still authorizes penalties.

Similarly narrow and unfounded is DOE's contention that "any . . . sanction" refers only to a singular type of legal authority. DOE Br. 21. Congress' use of "any", rather than denoting a singular connotation, has a broad application. *James*, 478 U.S. at 605. Congress' use of "all . . . sanctions" at an earlier point in the waiver also contradicts DOE's interpretation.

Finally, DOE argues that the Senate committee report did not expressly mention "penalties". DOE Br. 24, n. 18. However, the Senate not only wrote that federal agencies are subject to all state and local water pollution "provisions" (S. Rep. No. 370 at 67), but followed the waiver for sanctions with a limitation on civil penalties in the "arising under" sentence. The Court should apply the ordinary, intended meaning to this waiver rather than straining to adopt DOE's narrow interpretation.

B. Because Ohio's Penalties Originate Under, Are Mandated By, And Are Approved Under The Clean Water Act, They Are Penalties "Arising Under Federal Law" As That Phrase Is Used In The Federal Facilities Waiver.

A clause in 33 U.S.C. 1323 provides that federal agencies are liable "only for those civil penalties arising under Federal law . . . . " This clause, being an exception to the broad waiver expressed in the previous sentences of the section, must not be construed in an "unduly generous" fashion which runs the risk of defeating the central purpose of the statute. *Kosak*, 465 U.S. at 853, n. 9. Therefore, the "arising under" exception must not defeat the comprehensive nature of Congress' water pollution program or discourage federal agencies' compliance with that program.

"Arising under" Federal law is not the same as *conversion* into Federal law. "Arise" means to "originate" or "come into being." *Webster's New World Dictionary*, 2d ed. (1978).

As held by the courts below, Congress meant to restrict penalties to those imposed by federally approved water pollution programs. DOE Pet. App. 6a-8a, 42a-43a. Accord, *Metropolitan Sanitary District*, 722 F.Supp. at 1572. A State may obtain penalties only if its penalties are part of an authorized program, so that the State steps into the shoes of U.S. EPA to enforce the federal water pollution program. This clause also precludes municipalities and other local governments, if their programs are unauthorized, from imposing unapproved penalties on the federal government. E.g., *see Metro. Sanitary Dist. Of Greater Chicago v. United States*, 737 F.Supp. 51, 52 (N.D. Ill. 1990) (dismissal of penalty claims of local sewer district which, unlike Ohio, lacked federal approval for its penalties).

In 33 U.S.C. 1342(b), Congress authorized the States to implement the Clean Water Act by administering the federal water pollution program. The Clean Water Act specifically requires the State to abate violations through civil penalties and other enforcement mechanisms. The state permit program must be implemented "in accordance with" 33 U.S.C. 1342. 33 U.S.C. 1342(c)(2). The State then implements the Section 402 permit program *on behalf of and in lieu of U.S. EPA*. 33 U.S.C. 1342(c)(1). U.S. EPA can disapprove any permit issued by the State. 33 U.S.C. 1342(d)(2). Compliance with the state permit constitutes compliance with the Clean Water Act. 33 U.S.C. 1342(k). As the court of appeals below aptly noted, compliance with federally approved state law *is* compliance with the Clean Water Act. DOE Pet. App. 7a. Therefore, the entire permit program, including its civil penalty provisions, originates or arises from federal law.

Approved state programs thus *replace* federal implementation of the Clean Water Act. Adding to the federal character of the permits issued by States under approved programs is the fact that U.S. EPA can directly enforce the permits *as federal requirements*. 33 U.S.C. 1319(a). Therefore, the State is enforcing the same permit enforced as federal law by U.S. EPA, and citizens under 33 U.S.C. 1365.

As the court below noted, the introductory section of the Clean Water Act makes it clear that state permit programs arise *under* federal law by declaring:

> It is the policy of Congress that the *States* . . . implement the permit programs *under* sections 402 and 404 of this Act.

33 U.S.C. 1251(b) (emphasis added). On fourteen other occasions, Congress refers to a "permit issued *under* Section 402 of this Act . . . *by a State*" (emphasis added) or uses similar language. 33 U.S.C. 1314(g); 33 U.S.C. 1314(i)(1); 33 U.S.C. 1314(i)(2); 33 U.S.C. 1319(a)(1); 33 U.S.C. 1319(a)(3); 33 U.S.C. 1319(c)(1)(A); 33 U.S.C. 1319(c)(1)(B); 33 U.S.C. 1319(c)(2)(A); 33 U.S.C. 1319(c)(2)(B); 33 U.S.C. 1319(c)(3)(A); 33 U.S.C. 1319(d); 33 U.S.C. 1319(g); 33 U.S.C. 1342(a)(3); 33 U.S.C. 1342(c)(2).

The legislative history of the Clean Water Act similarly indicates that the State's permit program arises from federal law. The House report for the 1972 Act describes state permits as permits "issued . . . under Section 402" or issued "pursuant to" Section 402. H. R. Rep. No. 911 at 100, 120. The same report, in describing both State and U.S. EPA roles in the permit program, referred to "this program." H. R. Rep. No. 911 at 125. That is, there is only one program under federal law, and an authorized State administers it.

The conference report uses language consistent with that of the House report while explaining Section 402, stating:

> The conferees intend that the Administrator (or a *State) shall include in any permits issued under Section 402* (or shall require a *State to include in any permits issued under 402),* where appropriate, a schedule of compliance . . . . "

Conf. Rep. No. 1236, 92d Cong., 2d Sess. 140 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 3818 (emphasis added).

Because Congress regarded civil penalties as an essential part of the permit programs arising under the Clean Water Act, 33 U.S.C. 1342(b)(7) makes assessment of penalties mandatory for authorized state programs. According to the U.S. EPA regulations implementing 33 U.S.C. 1342, penalty assessment is a prerequisite for obtaining and keeping authorization of an NPDES program. 40 C.F.R. 123.27(a)(3). In fact, to meet U.S. EPA's programmatic requirements, a state's civil penalty authority must be $5,000 per day or higher. 40 C.F.R. 123.27(a)(3)(i). U.S. EPA's rules specifically mandate that penalties be imposed in "appropriate" amounts. 40 C.F.R. 123.27(c). Since assessment of civil penalties is a mandatory function of the NPDES permit program administered on behalf of the federal government, Congress regarded these civil penalties as arising under federal law.

Pursuant to 33 U.S.C. 1342 and 40 C.F.R. Part 123, Ohio has created an NPDES permit program to implement the Clean Water Act. Because the program did not exist until the Clean Water Act called for its formulation, Ohio's permit program truly "arises under" federal law. Ohio Revised Code Section 6111.03(J) provides the mechanism for the Ohio EPA Director to "[i]ssue, revoke, modify, or deny permits . . . in compliance with all requirements of the 'Federal Water Pollution Control Act' . . . . " The Director is not allowed to issue a permit to which U.S. EPA objects. O.R.C. 6111.03(J)(3).

O.R.C. 6111.03 commands state officials to administer Ohio's water pollution code "in the same manner that the 'Federal Water Pollution Control Act' is required to be administered." Therefore, contrary to DOE's assertion (DOE Br. 27), Ohio's water pollution issues will not be "resolved in substantially different ways" under state and federal law. By virtue of 40 C.F.R. 123.27(a)(3)(i), Ohio's maximum $10,000 per day civil penalty is also consistent with the Clean Water Act. In addition, Ohio EPA permits must attain compliance with "national effluent limitations, national standards of performance for new sources, and national toxic and pretreatment effluent standards" set by U.S. EPA under the Clean Water Act. O.R.C. 6111.03(J). Ohio EPA permits also

must, where necessary, impose "water quality related effluent limitations in accordance with sections 301, 302, 306 and 307 of the 'Federal Water Pollution Control Act' . . . . " O.R.C. 6111.03(J). O.R.C. Chapter 6111 contains no fewer than 33 references to the federal act in authorizing Ohio EPA to implement it.

Ohio Revised Code Section 6111.09 provides the mechanism to assess civil penalties against any "person" which violates an NPDES permit. Federal departments are included within the definition of "person", O.R.C. 6111.01(I), which in turn may be penalized pursuant to O.R.C. 6111.09. Both this definition and the penalty section were approved by U.S. EPA as part of Ohio's program. By virtue of U.S. EPA's authorization, these penalties against federal agencies arise under federal law.

DOE postulates that federal approval of Ohio's permit program and penalties does not convert Ohio's penalties into federal law. However, neither the State nor the decision below have contended that O.R.C. 6111.09 has been *converted* into a federal law. Instead, O.R.C. 6111.09 penalties have arisen under, i.e., *originated or come into being under,* federal law. Similarly, the citations of legislative history provided in DOE's brief simply mentions that state programs remain state law rather than being converted into federal law. These citations do not contradict the State's position that the penalties originate under federal law. Congressional statements about permits issued "under state law" are also consistent with the many statements in the Clean Water Act about state permits issued under federal law, since approval of the State's program and its substitution for U.S. EPA administration of the Act causes the permits to be issued under both state and federal law.

Similarly flawed is DOE's reliance on caselaw pertaining to the courts' exercise of federal question jurisdiction pursuant to 28 U.S.C. 1331. In *International Ass'n. of Machinists v. Central Airlines,* 372 U.S. 682 (1963), a private contract containing federally mandated conditions was held to "arise under federal law." The Court found that the contract

terms were derived from the federal statute and its policy. *Id.*, at 690-91. Thus, the contract depended on the federal statute for "power and authority" even though private action was necessary to implement its federal purpose. *Id.*, at 692.

Like the contract terms in *International Machinists*, O.R.C. 6111.09 penalties have their source in the authority of the Clean Water Act and its policy. Although the enactment of state law is necessary to draw upon this "power and authority", Ohio penalties still arise under federal law by virtue of their origin and the pervasive federal involvement in their approval and implementation.

However, while the Court could find that Ohio penalties "arise under federal law" under the principle of *International Machinists*, reliance on jurisdictional caselaw is unnecessary to decide the meaning of this phrase as intended in 33 U.S.C. 1323. The Clean Water Act waiver is the product of its own specific purpose and history, and thus must be construed consistently with the circumstances surrounding its enactment. On the other hand, the interpretations of 28 U.S.C. 1331 are the result of that statute's distinct purpose and history. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (1983). In fact, Article III of the Constitution, containing the same phrase as 28 U.S.C. 1331, has been construed differently due to the differences in its history and policy. *Id.* In *Citronelle-Mobile v. Gulf Oil Corp.*, 591 F.2d 711, 715 (Temp. Emerg. Ct. App. 1979), cert. denied, 444 U.S. 879 (1979), another federal statute providing "arising under" jurisdiction was interpreted in a third manner due to its distinct background and context.

Federal question jurisdiction implements Congress' policy to protect federal statutes from hostile state courts, as well as to apply the expertise of the federal judiciary to issues of federal law. In contrast, the phrase "arising under federal law" in 33 U.S.C. 1323 was enacted in an entirely different context. Rather than being concerned about destruction of federal statutes by state courts, Congress meant to encourage compliance with comprehensive, federally approved water pollution programs while shielding federal

agencies from unauthorized penalties. The use of "arising under" must be examined in light of expressed Congressional intent to enforce federal facility compliance with the Act, an objective which has not been, and cannot be, accomplished without the penalty deterrent.

Ohio has not sought independent federal question jurisdiction for its state penalty claims, nor does the State seek a holding which will expand federal question jurisdiction. In fact, while Ohio asserts *waiver* under 33 U.S.C. 1323, the State's complaint asserts federal court *jurisdiction* for the state claims only as pendent claims. J.A. 5. The State seeks to exercise a waiver provided by Congress as essential assistance in operating a federally mandated and approved program. The Court should not interpret the "arising under" exception in a fashion which defeats this purpose. *Kosak, supra.* In light of the ordinary meaning of "arise," the repeated statutory and legislative history references to state permits "under" the Act, the substitution of Ohio's program for the Administrator's, and U.S. EPA's approval of O.R.C. 6111.09 penalties against federal agencies, the Court should hold that Ohio's penalties arise under federal law.

IV. The Citizen Suit Provision Of The Clean Water Act Also Authorizes Civil Penalties Against Federal Facilities For Violating This Law.

The provision in 33 U.S.C. 1323 is not the only waiver of sovereign immunity in the Clean Water Act.[4] In 1972,

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[4] In its court of appeals brief, DOE argued that only 33 U.S.C. 1323, and not 33 U.S.C. 1365, is a waiver of sovereign immunity. R. 2, pp. 33-34. To DOE's credit, it thus far has not repeated the same argument to this Court. Moreover, it should be noted that, in *EPA v. California*, the federal government contended the opposite: that only 33 U.S.C. 1365 is a waiver. The federal agencies in that case argued that states, as citizens under that section, could file citizen suits to fill the loophole left by federal refusal to obtain state permits. In the event DOE's reply brief argues that 33 U.S.C. 1365 is not a waiver, the State has attached the relevant pages of the *EPA* brief in the appendix, *infra*. Cf. *Hancock*, 426 U.S. at 196 (State, under the analogous citizen suit provision in the Clean Air Act, can file suit against federal agencies).

Congress also made it clear that federal facilities are subject to civil penalties in citizen suits pursuant to Section 505, 33 U.S.C. 1365. Subsection (a) of this section provides in pertinent part:

> . . . [A]ny citizen may commence a civil action . . .
>
> (1) against any person (including (i) the United States . . .) . . . . The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under section 309(d) of this Act. [33 U.S.C. 1319].

In 33 U.S.C. 1365(a)(1), Congress expressly defined the United States as a "person" which can be sued. Section 309(d) provides that the courts can assess civil penalties against all "persons". 42 U.S.C. 1319. By incorporating Section 309(d) civil penalty authority in the same section defining the United States as a "person," Congress could not avoid noticing that [illegible]teral language subjects federal entities to penalties.

The waiver in 33 U.S.C. 1365(a) is complemented by the waiver in 33 U.S.C. 1323(a). The latter section subjects federal entities to "all Federal . . . sanctions." "[A]rising under Federal law" confirms the waiver for citizen suit penalties. If Congress had not authorized these penalties against federal entities, there would be no need for these two provisions. Since the Court will not interpret a statute so as to make one part inoperative, *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985), the Court should not make superfluous the two provisions of Section 313 by its interpretation of Section 505.

Although the court of appeals below did not rule on the federal penalty issue,[5] the Court of Appeals for the Tenth

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[5] A federal appellate court may decide an issue not adjudicated below where the proper resolution of that issue is clear. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). If the Court reverses the court of appeals' decision on state water pollution penalties, the Ohio/DOE stipulation

Circuit has held federal agencies subject to citizen suit penalties. *Sierra Club v. Lujan,* 931 F. 2d 1421 (10th Cir. 1991). The Tenth Circuit held that the definition of "person" in 33 U.S.C. 1365(a) subjects federal agencies to penalties pursuant to Section 309(d). *Id.* at 1427. In fact, with respect to the United States, the more specific definition of "person" in 33 U.S.C. 1365(a) takes precedence over the general definition in 33 U.S.C. 1362(5) omitting the United States. *Id.*

Congress is not obligated to place all of its definitions in the same statutory section. Congress instead saw fit to define the United States as a person in the same section that makes the United States liable for civil penalties. This definition applies to the entire act, including 33 U.S.C. 1319.[6]

DOE argues that 33 U.S.C. 1365(a) authorizes only "appropriate" civil penalties under 33 U.S.C. 1319(d), and that penalties against DOE are not appropriate because DOE is not a person. DOE Br. 32. However, "appropriate" in 33 U.S.C. 1365(a) refers to *civil penalties,* not appropriate *persons.* Had Congress wished to shield federal agencies from penalties, it would have allowed the courts to penalize only the appropriate "persons".

Congress' use of "appropriate" civil penalties refers to the well documented judicial discretion to adjust the size of a civil penalty depending on the facts and equities. U.S. EPA's regulations for state water pollution programs require the

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[5] *(footnote 5 cont.)*
of settlement still subjects DOE to penalties pursuant the citizen suit provision. J.A. 90-91. In this event, the court of appeals' finding of mootness for the citizen suit penalty issue would be erroneous and the Court's review appropriate.

[6] When writing other sections of the statute, Congress assumed that federal agencies were persons as defined by the Act. On ten occasions, Congress used the phrase "Federal and State agencies and *other* interested persons." (emphasis added). 33 U.S.C. 1345(d); 33 U.S.C. 1314(a)(1), (a)(2), (b), (c), (d)(1), (d)(2), (d)(3), (e) and (f).

State to seek penalties in amounts "appropriate to the violation." 40 C.F.R. 123.27(c) & note. The equitable factors considered by the courts include, *inter alia*, the seriousness of the violation and good faith efforts to comply.[7] Congress ratified the courts' use of these equitable factors by later incorporating them into Section 309(d) of the Clean Water Act. *Tull v. United States*, 481 U.S. 412, 422, n.8 (1987); 33 U.S.C. 1319(d). A number of decisions have referred to the term "appropriate" in 33 U.S.C. 1365 as confirmation of judicial authority to decide the size of a penalty. *Sierra Club v. Lujan*, 728 F. Supp. 1513, 1518 (D. Colo. 1990), aff'd 931 F. 2d 1421 (10th Cir. 1991); *Student Public Interest Research v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985).

The plain words of the citizen suit provision provide a clear waiver of sovereign immunity. Rather than accepting DOE's inventive construction of 33 U.S.C. 1365, the Court should honor the waiver written by Congress.

V. The Court of Appeals Correctly Held That The Language And Legislative History Of The RCRA Citizen Suit Provision Express Congressional Intent To Penalize Federal Agencies For Illegal Hazardous Waste Conduct.

As with the citizen suit provision of the Clean Water Act, 42 U.S.C. 6972 authorizes suit "against any person (including . . . the United States)" and gives the courts authority "to apply any appropriate civil penalties under section 3008(a)

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[7] DOE makes a remark in passing about penalties when a federal agency "cannot" comply with the law. DOE Br. 22. However, inability to comply is considered as a mitigating factor in penalty assessment under both state and federal law. In addition, the President can exempt a federal facility on such a circumstance under 33 U.S.C. 1323 (and 42 U.S.C. 6961) when in the paramount interest of the United States. Furthermore, to the extent this remark is meant to suggest that federal agencies have been unable, rather than unwilling, to obey the law, the Congressional findings described in the legislative history of RCRA and the Clean Water Act prove otherwise. Arg. I, *supra*.

and (g)." The "appropriate civil penalties" language was added in 1984.

The Senate report accompanying S. 757, the bill providing the current citizen suit provisions, confirms Congressional intent to subject federal agencies to civil penalties. In explaining what would happen to a federal agency which violated the hazardous waste inventory provisions of RCRA, the Senate stated:

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit *and penalty provisions of section 7002.* [42 U.S.C. 6972]. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States . . . ".

S. Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). (emphasis added).

This legislative explanation shows that, when Congress expanded the citizen suit provision to provide civil penalties, it was well aware that the definition of "person" in that provision included the United States. Defining the United States as a "person" in the same section containing the civil penalty authorization was meant to "assure that there is no confusion" about the courts' ability to penalize the United States. That this was the intent of the entire Congress became evident when the conference committee adopted the Senate's version of 42 U.S.C. 6972(a) word-for-word, saying, "The conference substitute adopts the Senate amendment . . . ." Conf. Rep. No. 1133, 98th Cong., 2d Sess. 117 (1984), *reprinted in* 1984 U.S. Code Cong., & Ad. News. 5688-89.

In response to the expression of waiver in 42 U.S.C. 6972 and Senate Report No. 284, DOE again raises its "person" and "appropriate" arguments. The State has responded to

these arguments in the context of the Clean Water Act, and will not repeat these responses here.

The State will, however, respond to one DOE argument unique to this statutory section. According to DOE, the Senate committee report's discussion of civil penalties does not indicate a Congressional intent to waive immunity because the discussion "was buried" in a section of the report unrelated to the citizen suit section. DOE Br. 44.

However, the Senate's discussion of civil penalties against federal agencies appears in a section of the Senate committee report prominently labelled "FEDERAL FACILITIES" in capital letters. S. Rep. No. 284 at 45. This section describes a number of provisions related to federal facilities, including the waiver of sovereign immunity in Section 6001. *Id.* Therefore, it is not surprising to find the penalty discussion of section 7002(a) under the same heading. Certainly, the statement that "a noncomplying agency . . . [is] subject to the citizen suit and penalty provisions of section 7002" is not ambiguous just because Congress simultaneously identified a violation for which an agency can be penalized. If anything, the example illustrates and strengthens Congressional intent.

The explicit language of 42 U.S.C. 6972 and the Senate committee report, either separately or in combination, leaves no doubt about Congressional intent to penalize federal agencies. Added to this language is Congress' intent, expressed in legislative history, to treat federal facilities just like private citizens in order to preserve the effectiveness of the comprehensive hazardous waste program. S. Rep. No. 988 at 23-24. Rather than accepting DOE's invitation to add ambiguity to the statute, the Court should reject DOE's attempt to escape liability for its wrongdoings.

VI. By Interpreting The RCRA Waiver For State Hazardous Waste Penalties In A Manner Inconsistent With The Plain Meaning Of The Language And By Creating An Exception To Exempt Penalties From The Broad Waiver

Intended By Congress To Cover All Enforcement Mechanisms, The Court Of Appeals Violated This Court's Principles Of Statutory Construction And Thwarted Congressional Policy.

A. By Admitting That Congress Used The Words "All Procedural Requirements" To Waive Immunity For Enforcement Mechanisms, And Then Ruling That Procedural Requirements Do Not Include Enforcement Mechanisms, The Court of Appeals Violated The Rules Of Statutory Construction Provided By This Court And Adopted A Rule Of Law Contrary To This Court's Decision In *Hancock v. Train*.

In its consideration of state hazardous waste penalties, the court of appeals acknowledged the history preceding the enactment of the RCRA waiver, concluding:

> Circumstances surrounding the passage of the Resource Conservation and Recovery Act also support a finding that "requirements" include civil penalties.

DOE Pet. App. 10a. The court of appeals even admitted that Congress had used the exact wording *Hancock* stated would effectuate a clear waiver for all enforcement mechanisms. *Id.*, at 10a-11a.

Then the court of appeals inexplicably adopted the Ninth Circuit position that *requirements do not include enforcement mechanisms*, stating that this is "a different plausible" reading of the waiver. DOE Pet. App. 12a. This "plausible" reading contradicts *Hancock*, which describes "enforcement mechanisms" as "procedural requirements" and ratifies the use of "all . . . requirements" as a complete waiver.

Therefore, the court of appeals ascertained underlying Congressional intent and policy in accordance with this Court's decisions in *Philbrook*, *Richards*, and *National City Bank*. However, the court of appeals then searched for "a different plausible" meaning that contradicted that known Congressional intent, thereby adopting the narrowest possible construction of the waiver contrary to this Court's decisions in *Bowen* and *Canadian Aviator*. Because the court of appeals has disregarded this Court's rules of statutory construction, and because that court's opinion will increase the danger and cost of hazardous waste pollution at federal facilities, the Court should reverse the court of appeals on this point.

B. Because The RCRA Waiver Includes All "Requirements" Without Limitation, And Because The Common Meaning Of "Requirements" Includes Civil Penalties, The Court Of Appeals Erred In Deleting Penalties From The Waiver.

The RCRA waiver in 42 U.S.C. 6961 waives immunity from *all* requirements, as follows:

> Each department . . . shall be subject to, and comply with, *all* federal [and] state . . . . requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) . . . .

(Emphasis added). In common usage, "requirements" is defined as "something called for or demanded." *Webster's Third New International Dictionary* 1929 (3d ed. 1981). Hazardous waste civil penalties, being called for or demanded by the hazardous waste laws, are obviously "requirements" of those laws.

To make the waiver even more explicit, the language in parentheses gives some examples of procedural

requirements. Permits, reports, injunctive relief, and sanctions to enforce injunctive relief are all listed as examples of requirements.

These examples are not a complete list of requirements for which sovereign immunity is waived. The section unequivocally states that federal facilities are subject to "*all* . . . requirements" (emphasis added), *including* those listed within the parentheses. The word "including" is a term of enlargement meant to illustrate rather than a limitation meant to exclude all items not specifically listed. *P.C. Pfeiffer Company v. Ford*, 444 U.S. 69, 77 n. 7 (1979); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941).

The nature of the listed examples also demonstrates that "requirements" include enforcement mechanisms. Because "injunctive relief" and "sanctions to enforce such relief" are enforcement mechanisms, "requirements" obviously include enforcement mechanisms. Any other interpretation of the section would be illogical, by saying, on the one hand, that two enforcement mechanisms are requirements and on the other hand, that requirements exclude enforcement mechanisms.

DOE's characterization of "requirements" as "prospective" but not "retrospective" relief (DOE Br. 12-13) creates the same internal inconsistency in the statute. One of the requirements listed in parentheses, reporting, is performed only after the occurrence of an event and thus is "retrospective." Therefore, Congress could not have intended to restrict waivers to prospective relief.

Statutes must be construed in a manner which will avoid inconsistency. *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942). Inconsistency can be avoided only by giving "requirements" the full effect intended by Congress. A normal reading of this provision subjects federal facilities to all enforcement mechanisms, including civil penalties.

Although DOE has argued that the 1976 waiver was meant to be a limited response to *Hancock* and *California*, the

parenthetical list of procedural requirements was not limited to "permits." Listing three requirements not litigated in those cases shows a broader intent to waive and is consistent with Congress' use of "all."

The progression of bills preceding final passage of RCRA also demonstrates the broad scope of its waiver. The enacted waiver originated in S. 3622, which broadly authorized "all . . . requirements, both substantive and procedural." S. Rep. No. 988 at 63.

Because Congress had not yet amended the Clean Water Act and Clean Air Act in response to *Hancock* and *California*, the inclusion of "all" and "procedural" in S. 3622 made the proposed RCRA language different than the waivers in the two existing acts. Nevertheless, Senate Report No. 988 characterized the federal facility section of S. 3622 as "parallel" to the waivers in the existing acts. S. Rep. No. 988 at 24. Congress regarded the existing air and water waivers as comprehensive, and viewed *Hancock* and *California* as misinterpretations of those waivers. See. Arg. I.C. above, especially the quotations from H.R. Rep. No. 294 at 199 and S. Rep. No. 370 at 67. The Senate report discussion in S. 3622 shows that the Senate viewed its RCRA waiver section as parallel to the air and water waivers originally intended by Congress, not as interpreted by *Hancock* and *California*. Therefore, the Senate added "all" and "procedural" to its RCRA bill to effectuate the same complete waiver originally intended in the air and water statutes.

Meanwhile, the House was designing H.R. 14496 without any waiver of immunity. The House decided to assign U.S. EPA the burden of enforcement against federal facilities "rather than subjecting federal facilities to state and local requirements," in order to relieve the states of "the almost impossible burdens of enforcing federal environmental laws against federal polluters." H.R. Rep. No. 1491 at 48-49, 51, *reprinted in* 1976 U.S. Code Cong & Ad. News at 6287, 6289. As a result, only federal hazardous waste requirements applied to federal agencies under the House bill, including civil penalties sought by U.S. EPA.

When passing RCRA, Congress accepted the Senate bill with its broad waiver and rejected the narrow, EPA-enforced federal facilities provision of the House bill. Therefore, rather than preserving federal immunity pursuant to H.R. 14496 and allowing only U.S. EPA to assess penalties, Congress broadly waived immunity for "all" requirements, both federal and state, substantive and "procedural." Substitution of the broad waiver of S. 3622 for the narrow federal facilities section of H.R. 14496 caused federal agencies to "be subject to state law and regulation." 122 Cong. Rec. 32599 (Sept. 27, 1976) (Rep. Skubitz, the minority floor manager). This saddled the States with the "almost impossible burdens" of enforcing the federally mandated hazardous waste programs against federal agencies, but provided States with the enforcement mechanisms to accomplish the task.

DOE contends that a specific reference to civil penalties would appear in the legislative history had Congress intended to authorize them. DOE Br. 39. However, this Court has noted that "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). Congress' reference to *all procedural* requirements makes the RCRA waiver intent clear on its face with respect to penalties.

As enacted, 42 U.S.C. 6961 broadly waived immunity for all requirements "in the same manner, and to the same extent" as private persons. This quoted language is almost identical to the language construed by this Court in *Goodyear Atomic Corp.* to provide a broad waiver without exceptions. 486 U.S. at 185. Obviously, Congress did not intend to place limitations on the RCRA waiver either.

C. By Admitting That The Plain Meaning Of "Requirements" Includes Civil Penalties, And Then Manufacturing Ambiguity As An Excuse To Exempt Penalties From That Plain Meaning, The Court Of Appeals Violated The Rules Of Statutory Construction Followed By This Court.

The district court in *Maine v. Navy*, 702 F.Supp. 322, 326 (D. Me. 1988), app. pend., No. 91-1064 (1st Cir.), remarked that "an intelligent person reading the statute would think the message plain" that RCRA requirements include civil penalties. That court noted that it would have been "nonsensical" to require Congress to make a detailed itemization of requirements in federal law and the laws of fifty states. *Id.*, at 327.

Similarly, the court of appeals below acknowledged:

> An ordinary reading of the phrase, "all . . . requirements," indicates that a civil penalty is a "requirement" because a party violating the statute will be required to pay the penalty.

DOE Pet. App. 10a. Thus, even the court of appeals realized that the plain meaning of the words of RCRA encompasses civil penalties.

Despite the admonitions of this Court to utilize the ordinary meaning of the words in a waiver, *Kosak*, 465 U.S. at 853, the court of appeals abandoned the ordinary meaning of "requirements" in favor of a search for ambiguity. The first reason cited for ignoring the plain meaning of the term concerned some differences in the language of RCRA and Clean Water Act waivers. DOE Pet. App. 11a. However, the courts are not allowed to insert ambiguity into the otherwise clear language of RCRA by looking to another statute. As the Court stated in *Yellow Cab Co.*, 740 U.S. at 550, the courts may not whittle down a broadly worded waiver by resorting to "refinements."

By deviating from the plain meaning of "requirements," the court of appeals also violated the admonition in *Turkette*. As discussed above, *Turkette* warns the courts to effectuate the plain meaning of words of waiver unless there is a *clear* Congressional mandate to differentiate from that plain meaning. 452 U.S. at 580. The court of appeals found no such clear mandate but disregarded the plain meaning of "requirements" anyway.

The second reason given by the court of appeals for its interpretation is the absence of a "specific mention" of "monetary relief or civil penalties." DOE Pet. App. 11a-12a. This reason for declining to find a waiver in 42 U.S.C. 6961 runs afoul of two principles elucidated in decisions of the Court. First, Congress is not required to itemize each and every item of waiver but instead may enact broad, sweeping waivers. *Yellow Cab*, 340 U.S. at 548. Second, strict construction may not be used to create exceptions to a sweeping waiver unless Congress has expressly set forth the exceptions in the statute. *Id.; Kosak*, 465 U.S. at 853. Under these cases, the court below was not permitted to speculate that the absence of the term "civil penalties" could mean an exception for penalties, since Congress has created a waiver for "all . . . requirements."

The court of appeals thus went out of its way to find a meaning for the waiver other than the one intended by Congress. By struggling to find an ambiguity in the waiver, the court of appeals has violated this Court's rules of statutory construction and has thwarted Congressional intent.

The waiver in 42 U.S.C. 6961 broadly requires federal agencies to be treated "in the same manner, and to the same extent" as the private sector. The court of appeals' decision nullifies this waiver and contradicts this Court's broad construction of almost identical language in *Goodyear Atomic Corp.* In order to halt this preferential treatment of polluting federal agencies, the State respectfully requests that the Court reverse the court of appeals decision on this issue.

D. The Post-Enactment Legislative Events Cited By DOE Confirm Congress' Original Intent To Waive Immunity For State Hazardous Waste Penalties.

The Court has used, or declined to use, post-enactment legislative history in its deliberations depending on the circumstances and reliability of the information. Compare

Tennessee Valley Authority v. Hill, 437 U.S. 153, 209 (1978), with *Russello v. United States*, 464 U.S. 16, 26 (1983).

As DOE notes, the conference committee report for the 1986 amendments to CERCLA states that "CERCLA, together with RCRA, requires Federal facilities to comply with all requirements, procedural and substantive, including fees and penalties." DOE Br. 40, n. 35; Conf. Rep. No. 962, 99th Cong., 2d Sess. 242 (1986). A similar statement by a co-sponsor of the CERCLA legislation went unchallenged during the floor debates. 132 Cong. Rec. 28,430 (Oct. 3, 1986). Since Congress designed CERCLA as a second hazardous waste statute to complement RCRA, simultaneous discussion of the two statutes was not unusual and should be afforded some weight.

Although DOE contends that the CERCLA discussion of penalties carries no weight (DOE Br. 40, n. 35), the Department itself chooses to draw on post-enactment history. DOE cites two pending RCRA bills, H.R. 2194 and S. 596, as waivers which are clear due to their express references to civil penalties. DOE Br. 39, n. 34.

However, the House Committee report for H.R. 2194, criticizing the judicial decisions restricting the RCRA waiver, unequivocally declares that the broad 1976 waiver clearly authorized penalties, stating:

> The Committee endorses the Ohio and Maine district court cases as correctly interpreting the intent of Congress in enacting Section 6001. In the Committee's view the language of the existing law was sufficiently clear to waive federal sovereign immunity for all provisions of solid and hazardous waste laws, including the imposition of criminal fines, civil or administrative penalties and all other sanctions. Thus, this legislation reaffirms existing law . . . .

H. Rep. No. 111 at 5. According to the report, H.R. 2194 is necessary only due to the misinterpretation of the waiver

by a number of lower courts.[8] *Id.* The report specifically endorses the district court decision in the case at bar as the correct interpretation of the waiver. *Id.*

House committee reports accompanying earlier versions of H.R. 2194 in past sessions have contained similar language. H.R. Rep. No. 141, 101st Cong., 1st Sess 5 (1989); H.R. Rep. No. 1060, 100th Cong., 2d Sess. 4 (1988). Both reports endorse the district court decision below.

The committee reports describe, in stark terms, the effects of the federal agencies' continued illegal activities as encouraged by the lower courts' failure to enforce Congress' waiver. Congressional investigation discovered that, at DOE facilities, "contamination of soil, sediments, surface water and groundwater, as well as vegetation and wildlife, is extensive . . . ." H.R. Rep. No. 111 at 3. The House report also quoted from the Congressional study, which summarized the results of DOE's unlawful conduct as follows:

> . . . "At every facility the groundwater is contaminated with hazardous chemicals. Most sites in nonarid locations also have surface water contamination. Millions of cubic yards of . . . .

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[8] According to the Senate Committee report accompanying S. 596, the purpose of the bill is to make the waiver "unambiguous." S. Rep. No. 67, 102d Cong., 1st Sess. 1, 7 (1991). This ambiguity was not present in the 1976 waiver, but was engrafted into the statute by the courts' acceptance of inventive federal agency arguments. The Senate committee discussions of ambiguity were made in the context of these court misinterpretations rather than as statements by the committee that the 1976 waiver is ambiguous as written. See S. Rep. No. 67 at 2, 4. The committee's view that the broad 1976 language effectuated a complete waiver is embodied in its statement that the Solid Waste Disposal Act [RCRA] and other pollution laws "all clearly specify that those laws apply to Federal facilities in the same manner and to the same extent as to all other persons." *Id.*, at 2. The committee concluded that addressing these unfavorable court decisions was necessary due to the "magnitude" of federal agency noncompliance with the law, citing a report of "widespread contamination of the environment with toxic chemicals . . . " and "potential human health threats." *Id.* at 3.

> hazardous wastes have been buried throughout the complex, and there are few adequate records of burial site locations and contents."

Id. at 3-4. The study attributed this damage to "poor waste management practices." *Id.*, at 4.

Once Congress amended the waivers in response to *Hancock* and *California*, one would have expected federal agencies to comply with RCRA and the Clean Water Act. However, instead of complying, they have chosen to continue their aggressive litigation against the waivers, expecting to persuade the courts to adopt their strained interpretations of the waiver language. As the Court noted in *Northern Securities*, 193 U.S. at 359-60, one can almost always create doubts about the meaning of a statute. The Court should end the federal agencies' reliance on the judiciary as the buffer between them and the law.

CONCLUSION

The Court should reverse the judgment below with respect to state hazardous waste penalties. In all other respects, the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

Pages 29-31 of Brief for Petitioner Environmental Protection Agency in *Environmental Protection Agency v. People of the State of California*, Case No. 74-1435 (Oct. Term, 1975)

within the context of the FWPCA, Section 402(b) not only fails to support the court of appeals' conclusion, but is squarely against it."[57]

Section 505, 33 U.S.C. (Supp. III) 1365, is the only other provision to which the court devoted any significant attention.[58] However, that section affords little, if any, support to the court of appeals' position.

Section 505 is a rather complex multi-functional provision. It is the only jurisdictional provision within the Act for civil suits under the Act; it is the sole waiver of federal immunity [59] from suit for civil

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[57] The court of appeals itself acknowledged the weakness of its own decision in the absence of those supporting bases heretofore discussed:

> Considered in the light of Sections 402 and 510, other sections in the Act afford added support to petitioners' interpretation of the term "requirements" in Section 313, *though the significance of each would have been less certain apart from these two sections.* (Pet. App. 22a-23a; emphasis supplied.)

[58] Section 505(a) establishes jurisdiction in federal courts, limits that jurisdiction to civil actions, eliminates the requirements of a minimal amount in controversy and diversity of citizenship, and defines standing for such an action.

The jurisdiction conferred by Section 505(a) is conditioned specifically upon compliance with the sixty-day notice of suit prerequisite established in Section 505(b).

Under Section 509(b), 33 U.S.C. (Supp. III), 1369(b), certain specific actions of the Administrator can be reviewed exclusively in the appropriate court of appeals on petition. The instant case focuses upon one of the types of action identified in Section 509(b) for such treatment. Another is a challenge to an individual permit. Section 509(b)(1)(F).

[59] That waiver is limited to actions against the federal government or its agencies for violations of an effluent standard or limitation (Section 505(a)(1)) and actions against the E.P.A. Administrator for failure to perform non-discretionary functions under the Act (Section 505(a)(2)).

relief within the Act;[60] and it is the enforcement provision designed to be used by the states to insure compliance with Section 313, inter alia.[61]

Section 505(f) refers, in a parenthetic clause, to Section 313, but this only supports petitioners' position

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[60] From the fact that by California law some substantive limitations may be set following administrative hearings in which a discharger may participate, the court of appeals inferred a federal susceptibility to state administrative procedures under the predecessor to Section 313, and it used that inference as guidance in reaching its decision. (Pet. App. 9a)

The weakness of that approach lies with the fact that there is a marked contrast between participation in hearings and a state permit. The latter is an instrument which may be issued or withheld, thereby giving the states actual control over the operations of the federal government.

As to how a state will establish those standards with which federal facilities must comply, Section 313 is silent; it assures only federal compliance with state standards. It is not a guarantee that the states will not have to modify their administrative practices in order to accommodate the legal characteristics of the federal government, its agencies, and its instrumentalities.

However, federal agencies must cooperate with the states with respect to compliance. Executive Order 11752, Section 3(a)(2), 38 Fed. Reg. 34793, 34794. Hence, they are required to provide states with whatever data are needed for standard setting.

[61] The enforcement mechanism of Section 505(a) is available to the states because a "State" is a "person" (Section 502(5), 33 U.S.C. (Supp. III) 1362(5)), a "person" is a "citizen" (Section 505(g), 33 U.S.C. (Supp. III) 1365(g)), and a citizen can bring suit under Section 505(a).

By providing states with this enforcement procedure through Section 505, Congress has eliminated what would otherwise appear to be a loophole left because the Act does not extend state permitting authority to federal facilites. By Section 313, as well as by Executive Order 11752, *supra*, federal facilities are required to meet applicable substantive standards and limi-

regarding the enforcement function of Section 505. Borrowed directly from Section 304(f) of the Clean Air Act, as amended,[62] the federal facilities compliance reference in Section 505(f) comes at the end of a list

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[61] *(footnote 61 cont.)*
tations. Hence, it would be redundant to impose upon them those same requirements under the authority of a state permit. If a federal installation fails to meet the relevant standards or limitations, it is not a state permit which the state can enforce to secure compliance, but rather the federal law through civil suit.

That Section 505 was intended to be the states' enforcement mechanism for federal facility compliance with Section 313 is made abundantly clear by the legislative history concerning the corresponding provisions in the Clean Air Act, Sections 118 and 304, 42 U.S.C. 1857f and 1857h-2, respectively, as we pointed out in our Brief (at pp. 24-26) in *Kentucky ex rel. Hancock v. Train, supra.*

The Clean Air Act's legislative history is quite relevant to the FWPCA with respect to the "citizen suit" provision, since Section 505 of the FWPCA is modeled upon Section 304 of the Clean Air Act. S. Rep No. 92-414, 92d Cong., 1st Sess. 79 (1971); 2 *Legis. Hist.* 1497.

[62] Section 304(f) of the Clean Air Act, 42 U.S.C. 1857h-2(f), reads as follows:

> (f) For purposes of this section, the term "emission standard or limitation under this Act" means-
>
> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or
>
> (2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act *(including a requirement applicable by reason of section 118)* or under an applicable implementation plan. (emphasis supplied).

A comparison of the Clean Air Act's Section 304(f) with the FWPCA's Section 505(f) (see Appendix, *infra*) undercuts the court of appeals' contention that the Water Act provision is in any way substantially different in form or effect from its Air Act counterpart (Pet. App. 25a).